IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT KNOXVILLE
Assigned on Briefs April 25, 2006

STATE OF TENNESSEE v. MARCUS JAMES COPENNY, ALIAS DESHUN NORWOOD, ALIAS MARK JAMES COPENNY

Appeal from the Criminal Court for Hamilton County
No. 245461 Rebecca J. Stern, Judge

No. E2005-01476-CCA-R3-CD - Filed June 5, 2006

The defendant, Marcus James Copenny, alias DeShun Norwood, alias Mark James Copeny, appeals the Hamilton County Criminal Court's sentencing determinations that followed his guilty plea to and conviction of attempt to commit voluntary manslaughter. The court imposed a maximum, incarcerative sentence of eight years. The defendant challenges the length and manner of service of the sentence. Upon our review, we affirm the judgment of the trial court.

Tenn. R. App. P. 3; Judgment of the Criminal Court is Affirmed.

JAMES CURWOOD WITT, JR., J., delivered the opinion of the court, in which JERRY L. SMITH and THOMAS T. WOODALL, JJ., joined.

Brandon D. Raulston, Chattanooga, Tennessee, for the Appellant, Marcus James Copenny, alias DeShun Norwood, alias Mark James Copenny.

Paul G. Summers, Attorney General & Reporter; Jennifer L. Bledsoe, Assistant Attorney General; William H. Cox, III, District Attorney General; and Bill Hall, Assistant District Attorney General, for the Appellee, State of Tennessee.

OPINION

The defendant's conviction of attempt to commit voluntary manslaughter resulted from the April 11, 2003 shooting of victim Theodore Hamilton. The defendant was apparently an uninvited guest at a barbecue or party at the victim's home. The victim testified at the sentencing hearing that he asked the defendant, whom the victim did not know, to leave and that, later, the defendant returned and became involved in an argument on the front porch. The victim testified at the sentencing hearing that he tried to persuade the defendant to leave, and the defendant shot him four times, resulting in colon surgery, nerve damage to his leg, lameness, and an inability to work.

The defendant testified at the sentencing hearing that a female acquaintance, whom he had taken to and left at the party, called him and asked him to return to the party to pick her up. He testified that, when he arrived, he was ambushed by the gun-wielding victim, whom he shot in self-defense. The police found a pistol with no firing pin in the victim's living room.

The evidence presented in the sentencing hearing showed that the defendant's prior criminal record consisted of 22 misdemeanor convictions and a juvenile adjudication that, if committed by an adult, would have been a felony. Although the defendant had never been placed on supervised probation, he had been serving unsupervised probations, two of which had been revoked. The defendant testified that the charged offenses that resulted in the revocations were ultimately dismissed.

In the sentencing hearing, the defendant expressed his regret in injuring the victim and described the shooting of the victim as a "once in a lifetime" event for the defendant.

The trial court based its imposition of the maximum eight-year sentence upon the following enhancement factors: factor (2), that the defendant has a previous history of criminal convictions or criminal behavior in addition to those necessary to establish the appropriate range; factor (7), that the personal injuries inflicted upon the victim were particularly great; factor (9), that the defendant has a previous history of unwillingness to comply with the conditions of a sentence involving release in the community; factor (10), that the defendant possessed or employed a firearm during the commission of the offense; factor (11), that the defendant had no hesitation about committing a crime when the risk to human life was high; and factor (17), that the crime was committed under circumstances under which the potential for bodily injury to a victim was great. *See* Tenn. Code Ann. § 40-35-114(2), (7), (9), (10), & (17) (2003) (amended Acts 2005, ch. 353). The trial court declined to apply any mitigating factors. *See id.* § 40-35-113.

The trial court declined to impose a sentencing alternative to confinement, essentially finding that all of the statutory factors that can support "sentences involving confinement" applied: Confinement is necessary to protect society by restraining a defendant who has a long history of criminal conduct and to avoid depreciating the seriousness of the offense; confinement is particularly suited to provide an effective deterrence to others likely to commit similar offenses, and measures less restrictive than confinement have frequently or recently been applied unsuccessfully to the defendant. *See id.* § 40-35-103(1)(A), (B), & (C).

When there is a challenge to the manner of service of a sentence, it is the duty of this court to conduct a de novo review of the record with a presumption that the determinations made by the trial court are correct. *Id.* § 40-35-401(d). This presumption is conditioned upon the affirmative showing in the record that the trial court considered the sentencing principles and all relevant facts and circumstances. *State v. Ashby*, 823 S.W.2d 166, 169 (Tenn. 1991). The burden of showing that the sentence is improper is upon the appellant. *Id.* In the event the record fails to demonstrate the required consideration by the trial court, review of the sentence is purely de novo. *Id.* If appellate review, however, reflects that the trial court properly considered all relevant factors and its findings

of fact are adequately supported by the record, this court must affirm the sentence, "even if we would have preferred a different result." *State v. Fletcher*, 805 S.W.2d 785, 789 (Tenn. Crim. App. 1991).

The sentencing court must consider (1) the evidence, if any, received at the trial and the sentencing hearing, (2) the presentence report, (3) the principles of sentencing and arguments as to sentencing alternatives, (4) the nature and characteristics of the criminal conduct involved, (5) evidence and information offered by the parties on the enhancement and mitigating factors, (6) any statements the defendant wishes to make in the defendant's behalf about sentencing, and (7) the potential for rehabilitation or treatment. Tenn. Code Ann. § 40-35-210(a), (b) (2003) (amended Acts 2005, ch. 353); *id.* § 40-35-103(5) (2003).

The defendant complains that his sentence is too lengthy because the trial court should not have relied upon his record of criminal convictions to enhance the sentence and because the trial court failed to apply mitigating factors that the defendant acted under strong provocation, that substantial grounds existed tending to excuse the defendant's criminal act, and that, in the aftermath of the offense, the defendant accepted responsibility for his actions and for his life, obtaining a graduate equivalency degree and securing employment. *See id.* § 40-35-113(2), (3) & (13) (2003) (enumerating permissive mitigating factors).

The defendant's extensive misdemeanor record clearly supports the application of factor (2), and the trial court did not err in applying that factor. We realize that the defendant claims that, because he was sentenced as a Range II offender and because the Range II classification requires a prior felony conviction, *see id.* § 40-35-106(a), which the defendant did not have, the court should not have utilized his misdemeanor record to enhance his Range II sentence. The Range II classification, however, was a feature of the plea agreement to which the defendant subscribed. *See State v. Timothy Johnson*, No. M2005-00168-CCA-R3-HC (Tenn. Crim. App., Nashville, Sept. 7, 2005) (discussing offender range in context of guilty plea). That classification was presented to the trial court pursuant to the plea agreement, and the trial court properly utilized the existing conviction record to apply factor (2).

The defendant next claims that he should have been awarded alternative sentencing to confinement because the trial court erred in finding that measures less restrictive than confinement were frequently or recently applied unsuccessfully to the defendant. *See* Tenn. Code Ann. § 40-35-103(1)(C) (2003). In his brief, the defendant argues that his "only unsuccessful experiences with alternative sentencing involved two suspended sentences related to misdemeanors that were revoked." The defendant emphasizes that he had never been placed on *supervised* probation and that, accordingly, the factor expressed in Code section 40-35-103(1)(C) does not apply. He cites no authority for this position.

Clearly, the trial court's application of factor (C) in Code section 40-35-103(1) is supported in the record. Even the defendant admits in his brief that two suspended sentences were revoked. We know of no requirement that factor (C) applies only when the revoked probation had been supervised.

The record in this case supports the trial court's sentencing determinations, and the court's judgment is affirmed.

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JAMES CURWOOD WITT, JR., JUDGE